BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CHARLIE FERGUSON	)	
Claimant	)	
VS.	)	
	)	Docket No. 248,404
TRANSWOOD, INC.	)	
Respondent	)	
AND	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals from the December 27, 1999, preliminary hearing Order of Administrative Law Judge Jon L. Frobish. Claimant was granted benefits for an accidental injury occurring on September 1, 1999, after the Administrative Law Judge found claimant's accidental injury arose out of and in the course of his employment.

ISSUES

Did claimant's September 1, 1999, accidental injury arise out of and in the course of his employment with respondent? Or was claimant's deviation from his business trip, for personal reasons, so major that benefits should be denied?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purpose of preliminary hearing, the Appeals Board finds as follows:

Claimant, a truck driver for respondent, on the date of accident, had been dispatched to haul a load of concrete from Fredonia, Kansas, to Wichita, Kansas. The most direct route involved a short trip from Fredonia, Kansas, north on Highway 39, followed by an approximately 85-mile run west on Highway 400 to Wichita, Kansas. Highway 400 had been designated by respondent as the route to take from Fredonia to Wichita. It was the shortest route and Highway 400 is a new highway with paved shoulders and is considered by respondent to be the safest route from Fredonia to Wichita for large trucks.

On the date of accident, claimant arrived at work late, having attended a parent/teacher conference at his children's school in the morning. He was assigned to deliver a load from Fredonia to Wichita, which he completed. Claimant was then assigned to pick up another load of bulk cement at the Fredonia facility and deliver it to Wichita before 6:00 p.m. Claimant proceeded to the Fredonia cement plant and loaded his truck. At that point, claimant deviated from his normal route, going south out of Fredonia on Highway 39, and then west on Highway 160 to Longton, Kansas, where he picked up his two minor sons.

The record is unclear as to what claimant intended next. At one point, claimant advised his supervisor, Todd Mangan, that he planned to deliver his children to their babysitter in Howard, Kansas. At the preliminary hearing, claimant testified that he intended to drive straight to the Wichita plant, with his sons accompanying him as passengers for the entire trip. This, however, would have been against company policy.

Regardless of claimant's intentions, approximately seven miles west of Longton, on Highway 160, claimant's truck was forced off the road by a semitrailer pulling a mobile home. As Highway 160 is a very narrow road with practically no shoulder, when claimant moved the tanker truck to the right, the back axle of the truck dropped off the paved highway into the ditch, causing the truck to lay over on its right side. Claimant injured his back as a result of that accident.

Claimant testified he intended to turn north on Highway 99, passing through Howard, where he either would have delivered his children to the babysitter or proceeded north to Highway 400 and then west to Wichita. However, claimant never reached Highway 99, as the accident occurred between Longton and the Highway 99/Highway 160 intersection.

In the employment to which the workers compensation law applies, an employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment. K.S.A. 1999 Supp. 44-501(a). Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case. Kindel v. Ferco Rental, Inc., 258 Kan. 272, 899 P.2d 1058 (1995).

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. Id. at 278.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal

> connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.

Id. at 278; Hormann v. New Hampshire Ins. Co., 236 Kan. 190, 689 P.2d 837 (1984); Newman v. Bennett, 212 Kan. 562, 512 P.2d 497 (1973).

In determining whether claimant's accidental injury arose out of and in the course of his employment, the Board must consider whether the deviation by claimant was sufficient to find that claimant had abandoned the employer's business for personal reasons, thus causing a denial of benefits to be proper. In Larson's Workers' Compensation Law, the majority rule is that an identifiable deviation from a business trip for personal reasons takes the employee out of the course of employment until the employee returns to the route of the business trip, unless the deviation is so small as to be disregarded as insubstantial. § 17.01 (1999). A common variation of this rule is the side trip, which occurs somewhere along the course of the main journey, when the main journey is intended as a business journey and a side-trip is of a personal nature. Larson's, § 17.03[3] (1999), describes the majority rule as until the side-trip is completed, the deviation for personal reasons would cause a denial of benefits. The majority rule seems to require that an employee, who has detoured on a personal trip, before being deemed to have resumed the business trip, must "get back on the beam." Larson's, § 17.03[6] (1999).

The Kansas Supreme Court, in Kindel v. Ferco Rental, Inc., *supra*, found that an employee's death arose in the course of his employment when the employee was being transported home, as a passenger, after the completion of his duties. The distance of the deviation, while occupying over four hours, was less than one-quarter mile off the road. At the time of the employee's death, the employer and his supervisor, who was driving that week, had resumed the route home, having returned to I-70 on their way to Salina, Kansas.

In this instance, the deviation caused claimant to drive approximately 30 miles farther than he would have on this original 90-mile trip. At the time of the accident, claimant was over 20 miles south of Highway 400, traveling on a narrow, two-lane highway. In the vehicle with him, contrary to company policy, were his two young sons.

Larson's notes that, if the incidents of the deviation itself are operative to producing the accident, or where the very act of the deviation introduces the hazard which leads to the accident, this circumstance will weigh heavily toward noncompensability. Rather than

driving on the improved, two-lane Highway 400, claimant found himself on the narrow, twisty, two-lane, no-shoulders Highway 160.

The Appeals Board finds that claimant deviated from his business trip for personal reasons and, at the time of the accident, had not yet returned to his business route. In addition, being on Highway 160, rather than Highway 400, directly contributed to the accident. The Appeals Board, therefore, finds that claimant's deviation was so substantial as to require a denial of benefits.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Jon L. Frobish dated December 27, 1999, should be, and is hereby, reversed, and the claimant, Charlie Ferguson, is denied compensation for the injuries suffered on September 1, 1999.

IT IS SO ORDERED.

Dated this ____ day of March 2000.

BOARD MEMBER

c: Robert W. Lattin, Independence, KS
Anton C. Andersen, Kansas City, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director